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IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1590

WILLIAM C. KAHL, State Superintendent of Public Instruction,
Petitoner,

v.

HOLY TRINITY COMMUNITY SCHOOL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

WILLIAM C. KAHL, State
Superintendent of Public Instruction,
Petitioner,

v.

HOLY TRINITY COMMUNITY
SCHOOL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Barbara Thompson, Wisconsin State Superintendent of Public Instruction, successor to William C. Kahl, defendant-respondent in the Wisconsin Supreme Court below, respectfully prays that a writ of certiorari be issued to review the judgment of the Wisconsin Supreme Court made in this proceeding on February 7, 1978.

OPINION BELOW

The opinion of the Wisconsin Supreme Court appears in 82 Wis. 2d 139, 262 N.W. 2d 210 (1978), and in the appendix hereto.

JURISDICTION

The judgment of the Wisconsin Supreme Court was made February 7, 1978, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3) in that the validity of a state statute is drawn into question as violating the prohibition against the establishment of religion as provided by the first amendment to the United States Constitution.

QUESTIONS PRESENTED

1. To what extent may a governmental agency inquire into the affairs of religious organizations seeking public funds or the benefit of publicly funded programs?

2. May a state agency determine the eligibility of religious corporations for publicly funded programs by inquiring behind its articles of incorporation?

3. Does the first amendment foreclose a determination by the state superintendent of public instruction of the religious affiliation, if any, of a private school where such finding is necessary in order to determine the eligibility of the school for publicly funded programs?

STATUTORY PROVISIONS INVOLVED

The statutes involved in this petition are:

Section 121.51(2), (3) and (4), Wisconsin Statutes, 1973.

> "(2) 'School board' has the meaning designated in s. 115.01(4) and includes any governmental agency transporting children to and from public schools.
>
> "(3) 'Private school' means any parochial or private elementary or high school in this state offering any academic grades comparable to those described in s. 115.01(2), including kindergarten.
>
> "(4) 'Attendance area' is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. The attendance areas of private schools affiliated with the same religious denomination shall not overlap."

Section 121.54(1), (2)(b) and (c), Wisconsin Statutes, 1973.

> "(1) CITY OPTION. Subsections (2) and (6) and s. 121.57 do not apply to pupils who reside in cities unless the school they attend is

located outside the city but within the boundaries of the school district. Where an annual or special meeting of a common school district or a union high school district, or the school board of a city school district or unified school district determines to provide transportation for such pupils, state aid shall be paid in accordance with s. 121.58 and there shall be reasonable uniformity in the transportation furnished such pupils whether they attend public or private schools.

"(2) * * *

"(b) 1. Except as provided in sub. (1) or otherwise provided in this subsection, the school board of each district operating high school grades shall provide transportation to and from the school he attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from his residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along the usually traveled route.

" * * *

"(c) An annual or special meeting of a common school district or union high school district, or the school board of a city school district or unified school district may determine to provide transportation for all or part of the pupils who reside in the school district

to and from the nearest public school they are entitled to attend or the private school within or without the school district within whose attendance area they reside, but if transportation is provided for less than all such pupils there shall be reasonable uniformity in the minimum distance that pupils attending public and private schools will be transported. Except for elementary school districts electing to furnish transportation under par. (b)2, this paragraph does not permit the annual or special meeting or school board in a district operating only elementary grades to provide for the transportation of pupils attending private schools."

United States Const. art. I, amend. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case involves the statutory scheme for transportation at public expense of children attending private and parochial schools.

The Wisconsin statutes cited herein require that the local school board and the authorities of private and parochial schools who desire the children attending these schools to be transported at public expense agree on attendance areas of the parochial and private schools. To be eligible for public funds for transportation for its students these schools must have an attendance area that does not overlap with the attendance areas of other parochial schools affiliated with the same religious denomination.

The respondent school attempted to disaffiliate with the Roman Catholic Church by filing articles of incorporation to that effect with the Wisconsin Secretary of State. The result was tha the school stands to gain an attendance area coterminous with the boundaries of the school district which is approximately 96 square miles in area.

The state superintendent having been called upon by both the school board and the private school, pursuant to sec. 121.51(4), Wis. Stats., held a hearing in order to make a determination as to the attendance area. The state superintendent determined that while the form of the organization of the school district may have been altered, that in substance the respondent continued to be affiliated with the Roman Catholic Church. The respondent then appealed to the circuit court of Dane County, Wisconsin. That court affirmed the findings of the state superintendent and respondent appealed to the Wisconsin Supreme Court who reversed the circuit court's findings.

HOW FEDERAL QUESTION IS PRESENTED

On review by the circuit court of Dane County, Wisconsin, the respondent raised the question of whether the statute involved violated the first amendment established under the freedom of religion clauses. The trial court determined that neither the establishment clause or the freedom of religion clauses were violated and that the determination by the state superintendent was essentially a nonecclesiastical one not involving canon law and that such a determination did not interfere with the religious beliefs or practices of the respondent or its members.

The Wisconsin Supreme Court on appeal stated that the problem was whether "this court, for the purpose of determining a school-attendance area, may inquire, and determine, whether the school is affiliated with the Roman Catholic denomination or whether, under the strictures imposed upon the government by the First Amendment to the Constitution of the United States, we are required to refrain from making that inquiry and determination." (*See* Appendix, p. 105.)

The court concluded:

> ". . . For this court or for the Superintendent of Public Instruction to determine, in the light of the *prima facie* showing of the articles of incorporation to the contrary, that this school corporation is or is not affiliated with the Catholic denomination is to meddle into what is forbidden by the Constitution — the determination of matters of faith and religious allegiance." (*See* Appendix, pp. 111-112.)

REASON FOR GRANTING WRIT

A. The Opinion Below Misinterprets The Establishment Clause.

This opinion prohibits inquiry by a governmental agency beyond the corporate charter of an allegedly religious organization who has applied for a public grant or assistance. In reaching this conclusion the Wisconsin Supreme Court stated:

> ". . . to make the inquiry and to determine that the school is or is not affiliated with the Catholic denomination is to make an impermissible inquisition into religious matters. We are obliged to accept the professions of the school and to accord them validity without further inquiry." (*See* Appendix, p. 117.)

Contrary to the opinion of the Wisconsin Supreme Court inquiry into the nature of an allegedly religious organization does not necessarily raise a first amendment religious question when the purpose of the inquiry is to determine the eligibility of a religious organization to benefit from publicly funded programs or to benefit from a tax exemption.

Religious teaching cannot be a private affair when the state seeks to impose regulations on it and a public affair when it comes to taxing citizens of other faiths to support it. *See Everson v. Board of Education*, 330 U.S. 1, 27 (1947), Justice Jackson dissenting and *Tilton v. Richardson*, 403 U.S. 672 (1971).

Therefore, there is not only the effective even-handed administration of programs for the benefit of children attending parochial schools that is frustrated but there is

also disturbed that delicate balance between the right of an individual to liberties of religion and expression uninfringed by denial of or placing of conditions upon the benefit or privileged and the duty of the state to comply with the establishment clause by uniformly administering statutory programs of tax exemption and educational assistance. *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963).

It is true while on the one hand state programs of assistance cannot be conditioned on the surrendering by an individual of his rights. On the other hand regulations necessary to administer the program to institutions may be lawfully applied without violating the establishment clause of the first amendment. Such an even-handed application is frustrated in this case by limiting inquiry in the case of religious corporations to the content of the corporate charter. These limitations imposed have application not only to the administration of educational assistance programs but, for example, to federal, state and local tax laws which grant a wide range of tax exemptions to religious organizations.

B. The Opinion Below In Fact Puts The Petitioner In The Position Of Violating The Establishment Clause.

In *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), the court stated:

> "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Indeed, under the statutory exemption before us in Walz, the State had a

> continuing burden to ascertain that the exempt property was in fact being used for religious worship. . . ."

Viewed in the light of *Walz v. Tax Commission*, 397 U.S. 664 (1970), and the history of the development of the first amendment, the finding of fact that an institution is or is not affiliated with a particular religious denomination does not establish or interfere with religion.

Under the construction given by the Wisconsin Supreme Court if an institution is in fact religiously affiliated with a particular denomination but may render itself eligible for state aid or assistance by simply drafting articles of incorporation stating it is not so affiliated, such state assistance would be "establishing" that particular religion. To carry the opinion of the Wisconsin Supreme Court to its logical end any religious denomination or organization could prevent the effective application of the establishment clause by simply stating that it is not a religious organization or on the other hand qualify for tax exemption by stating that it is a religious organization. If mere assertions of such positions by statements in bylaws or articles of incorporation are sufficient to bar further investigation by the state, then the establishment clause approaches the point of being meaningless.

The Wisconsin Supreme Court fails to recognize that from the early days of our constitutional history the United States Supreme Court has recognized that although settlement of purely doctrinal issues between churches or factions of a particular church is not a proper subject to the exercise of judicial review, courts can, and in fact must, hear evidence and determine issues of ecclesiastical relationships and affiliation or nonaffiliation when such matters are necessarily involved in a determination of legal rights. *See Watson v. Jones*, 13 Wall 679 (1872); *Bouldin v.*

Alexander, 15 Wall 131 (1872); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); and *Christian Echoes National Ministry v. U.S.*, 470 F. 2d 849 (10th Cir. 1972), *cert. denied* 414 U.S. 864 (1973).

Because of the conflict of the decision of the Wisconsin Supreme Court with the established law, this writ should be issued to permit the court to clearly define the permissible areas of inquiry available to the several states in publicly funded programs designed to benefit religious organizations or institutions.

Respectfully submitted,

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APPENDIX

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No. 75-731

August Term, 1977

STATE OF WISCONSIN : IN SUPREME COURT

HOLY TRINITY COMMUNITY SCHOOL, INC.,
Appellant,

v.

WILLIAM C. KAHL,
State Superintendent of Public Instruction
of the State of Wisconsin,
Respondent.

APPEAL from a judgment of the circuit court for Dane county: RICHARD W. BARDWELL, Circuit Judge. *Reversed and remanded.*

HEFFERNAN, J. This case originated on the petition of the Holy Trinity Community School (Community School) to the Board of the Racine County Unified School District requesting that an attendance area be designated for the school co-extensive with the geographic area of the entire district.

The District School Board denied the Community School's application because the school was affiliated with the Roman Catholic denomination and the requested attendance area would, therefore, have overlapped attendance areas assigned to other Roman Catholic schools.

The statute under which the petition was authorized, and pursuant to which the school board acted, is sec. 121.54(4), Stats.:

> "'Attendance area' is the geographic area designated by the governing body of a private school as the area from which its pupils attend and approved by the school board of the district in which the private school is located. If the private school and the school board cannot agree on the attendance area, the state superintendent shall, upon the request of the private school and the board, make a final determination of the attendance area. The attendance areas of private schools affiliated with the same religious denomination shall not overlap."

Upon the denial of the petition, the district school board's determination was submitted to the State Superintendent of Public Instruction.[1] After a hearing, an order was issued by the State Superintendent denying the requested attendance area.

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[1] William C. Kahl, State Superintendent of Public Instruction, was succeeded in office by Barbara Thompson on July 2, 1973. There has, however, been no formal substi-

(footnote 1 continued on next page)

On September 20, 1972, the Community School commenced an action for review in the circuit court for Dane county. For reasons not fully explained, the filing of the record was delayed and briefs were not submitted to the circuit court until September of 1975. Following a hearing in the circuit court for Dane county, a judgment was entered on February 23, 1976, affirming the order of the Superintendent of Public Instruction which dismissed the Community School's petition for a district-wide attendance area.

The case is before us on appeal from the judgment of the circuit court.

On this appeal the parties agree that, if the Community School is not affiliated with a religious denomination, as a private school it is entitled to an attendance area co-extensive with the school district; and, conversely, that, if it is affiliated, its attendance area must be one which does not overlap the attendance areas of other schools in the district affiliated with the same denomination.

It is basically the position of the Community School that the question of religious affiliation or the determination of the denominational fealty of the school is not justiciable in a court of the civil government.

(footnote 1 continued)

tution of the respondent in the pleadings; and, accordingly, in this opinion we refer to the named respondent. The opinion and mandate of this court is, of course, binding upon the present Superintendent of Public Instruction.

The State Superintendent of Public Instruction looks upon this appeal as raising only the routine type of question normally to be expected in a certiorari review, *i.e.*, was the determination a reasonable one under the facts adduced at the hearing.

Although holdings involving the relations between church and state are numerous, the question posed here appears to be unique, for here a concededly private school disclaims any religious affiliation, while the state asserts the school is Catholic.

Arguably at least, the issue posed implicates questions in the sensitive area of relations between church and state.

In Wisconsin, following the Supreme Court case of *Everson v. Board of Education*, 330 U.S. 1 (1947), and the adoption of Art. I, sec. 23, of the Wisconsin Constitution, the authority of the legislature to provide for the transportation of children to and from any parochial or private school is unchallenged.[/2] The nature of the school, whether it be public or private, sectarian or not, therefore is irrelevant to its statutory right to receive transportation aids. Accordingly, the numerous cases which can be found

[/2] Art. I, sec. 23, of the Wisconsin Constitution provides:

> "Transportation of school children. Section 23. Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning."

in both the state and federal reports which address themselves to the propriety of using public funds for the support of a sectarian institution are irrelevant. Although the Community School were found to be sectarian, transportation aids would be permissible under the Constitutions of Wisconsin and the United States and the statutes of Wisconsin.

Despite some protestations to the contrary by the Community School, it is clear, from the school's articles of incorporation, that it is a religious school. The bylaws of the corporation provide that, "The school maintained by corporation shall be operated in a Christian-Judeo tradition." Although the bylaws specifically disavow any "affiliation" with any religious denomination, nevertheless, Article 4 of the bylaws states that students are to be encouraged "to practice the religion of their choice."

The record also shows that religious instruction is carried on in the school itself by a released-time program, although the instructors are not members of the school staff.

It is apparent that the school has formally dedicated itself to the promotion of religion in a manner that would not be permitted in a public school, but this fact is irrelevant to the right of a private school to receive transportation aids.

The problem is basically whether this court, for the purpose of determining a school-attendance area, may inquire, and determine, whether the school is affiliated with the Roman Catholic denomination or whether, under the strictures imposed upon government by the First Amendment to the Constitution of the United States, we are required to refrain from making that inquiry and determination.

The following chronology is appropriate to the understanding of the problem. The facts indicate that originally the Catholic churches in the Racine area were located in ethnic neighborhoods and that the parochial schools were established to furnish religious education to the children of parishioners who lived near the church.

As the result of social and economic changes, these ethnic communities were dispersed over a large area, but students no longer living in the immediate neighborhood of the church and school continued to attend there. This resulted in substantial difficulties for the Holy Trinity [Catholic] School, the predecessor of the Community School, because its students were spread over wide areas of the school district. Other Catholic parochial schools faced the same problem, which was aggravated under the statute requiring non-overlapping attendance districts for schools affiliated with the same denomination.

The Holy Trinity School, together with other parochial schools, in 1971 brought an original action in this court to secure a declaration that the portion of sec. 121.51(4), Stats., which provides that attendance areas of private schools affiliated with the same religous denomination shall not overlap was unconstitutional. We held the statute to be constitutional after construing the statute to provide that the rule which prohibits overlapping was a general rule applicable to both secular and religious schools. We held that the effect of the statute was to prohibit overlapping attendance districts in respect to public schools, private nonreligious schools operated under the same system, and religious schools affiliated or operated by a single sponsoring group or denomination. In dicta, we stated that, although separate Catholic orders operated schools in a particular school district, they were to be considered along with the diocesan schools as part of the

Catholic school system, because they were all affiliated with the same religious denomination. *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 188 N.W. 2d 460 (1971).

After the determination of the constitutionality of sec. 121.51(4), Stats., the Holy Trinity School was obliged, were it to remain a Catholic school, to be assigned a transportation attendance area which did not comport with the geographic area whence it drew its students.

In the recitation of facts incorporated in the circuit judge's direction for judgment appears this statement, unquestioned on this appeal:

> "To overcome the limitation of sec. 121.51(4), which forbids the overlapping of attendance areas for schools affiliated with the same religious denomination, Holy Trinity incorporated under chapter 181, Wis. Stats., as a non-denominational private school."

Accordingly, in December of 1971, the Holy Trinity School, which was admittedly a Roman Catholic school operated by the Holy Trinity Congregation, ceased to operate, and in its stead the Holy Trinity Community School was incorporated. This new school has no legal ties to the Roman Catholic church and its bylaws provide that the school shall have no affiliation with any religious denomination.

When the new school was incorporated, it took over the day-to-day operations of its predecessor. By assuming the existing teachers' contracts of the Catholic school, it agreed to employ, at least for the first semester, the same teachers, five of whom were nuns, who had been employed

by the predecessor school. It also agreed to accept the students previously enrolled in the parish school. The building occupied by the newly incorporated school was the one previously used, and it continued to be owned by the Holy Trinity Congregation. The Congregation, however, leased the school building and all the facilities therein to the new Community School for a rental of one dollar per year.

The usual and formal Catholic religious instruction carried on in the predecessor school was discontinued, and the new Community School instituted a released-time program under which students could be released from their classes for one-half hour each day to attend religious instruction of their parents' choice. The released-tie program was carried on within the school building under the tutelage of the Holy Trinity parish priest. He was not an employee of the school corporation. Other religions were invited to participate in the released-time program, but none has accepted that invitation, and the record shows that only the Catholic religion is taught in the released-time program. At the time of the school's petition in 1971, approximately 75 percent of the students attended the Catholic released-time instruction sessions. Eighty percent of the students then attending the school were children of members of the Holy Trinity Congregation.

In 1971, when the petition was submitted to the district school board, all of the faculty members were Catholic, and five of them were nuns, who taught garbed in their religious habits. The record makes clear, however, that the school operated independently of the diocesan school superintendent, and, in respect to the courses taught, there was no conformity to any hierarchically imposed Catholic curriculum.

On the basis of these facts, the Superintendent of Public Instruction found that this school was affiliated with the Catholic denomination and that it need not be controlled by the archdiocese in which it is located for it to be affiliated with the Roman Catholic Church. Relying on *Herman v. United Automobile, Aircraft & Agricultural Implement Workers of America*, 264 Wis. 562, 569, 59 N.W. 2d 475 (1953), he asserts:

> "The word 'affiliated' . . . literally means a close association . . . . When used with respect to organizations, the word means that two or more organizations are allied with or closely connected with one another, or with a central body."

Using this definition and relying on the facts recited above, the Superintendent of Public Instruction contends that the mere separation of the school, as a legal entity, from the Catholic Church, of which it was previously a part, is insufficient to show that it is no longer affiliated with that denomination. In short, the Superintendent would have us pierce the corporate veil to look at the facts and, from those facts, determine that, despite the protestation of the corporation, it nevertheless is Roman Catholic and is affiliated with that denomination.

Were the school claiming to be a public school supported by public taxes and were the facts found as set forth above, we would, on the basis of well established precedent, conclude that public funds were being unconstitutionally used for sectarian or religious purposes.[3] Here, however,

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[3] *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918); *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W. 2d 609

(footnote 3 continued on next page)

the claim of the petitioner is not that it is a public school and entitled to public funding, but that it is a private school — albeit of a religious nature — asking for only such financial support from the state for student transportation as would be afforded to any other private religious institution. The state, by the Superintendent of Public Instruction, is, in effect, insisting that it, on the basis of inspection and surveillance of the school, may determine the denominational allegiance of the institution.

(footnote 3 continued)

(1942); *Berghorn v. Reorganized School District No. 8*, 364 Mo. 121, 260 S.W. 2d 573 (1953); *State ex rel. Public School District No. 6 v. Taylor*, 122 Neb. 454, 240 N.W. 573 (1932). These cases involve schools, ostensibly public, and supported by public funds, which were in fact being operated as sectarian institutions. Under such circumstances, the civil court is obligated to examine the actual practices of the school in detail because of the constitutional prohibition against establishment of religion. If the "public" school is in fact a sectarian school, then it is unconstitutional to use tax funds for its support. The inquiry is constitutionally required in order to prevent an independent constitutional violation. In the present case, however, there is no analogous constitutional justification for scrutiny of the practices of the school, because it would be constitutionally permissible to provide publicly funded transportation to the students even were the school concededly sectarian. Therefore, the "excessive entanglement" problem becomes paramount under the facts of this case, and we are required to give effect to the strong constitutional interest in prohibiting the continuing surveillance which would be necessary to determine whether or not the school is affiliated with a particular religious denomination.

We have previously alluded to the fact that the hearing of this appeal has been delayed for several years by the inexplicable failure to file the record. Accordingly, the facts set forth above have substantially changed. At oral argument is was conceded that no nuns now teach in the school and that over 50 percent of the students are unrelated to members of the Holy Trinity Congregation.

The incorporators of the Community School point out that the state seeks to judge the nature of the school and its affiliation on the state of the record as the facts appeared seven years ago at the time of the initial transition to the school's independent status. The petitioners claim that those facts had only temporary relevance, because they were obliged to carry out the contracts of the predecessor school. Counsel for the Superintendent of Public Instruction stated at oral argument that, if such were the case, a new application for an attendance area could be submitted on the basis of the changed facts and a new determination could be made.

It is apparent, then, that the Superintendent of Public Instruction in administering sec. 121.51(4), Stats., envisages his duty as necessitating continued examination and surveillance of the religious composition of both the instructional staff and the students of the Community School. The Superintendent of Public Instruction conceives it to be his obligation to monitor religious schools to determine to what denomination they owe allegiance and with what denomination they are affiliated.

Under the facts peculiar to this case, the attempt of the Superintendent of Public Instruction to administer the law results in excessive entanglement of state authority in religious affairs. For this court or for the Superintendent of Public Instruction to determine, in the light of the *prima*

facie showing of the articles of incorporation to the contrary, that this school corporation is or is not affiliated with the Catholic denomination is to meddle into what is forbidden by the Constitution — the determination of matters of faith and religious allegiance.

Under the First and Fourteenth Amendments to the Constitution, state authorities may make no laws respecting the establishment of religion or prohibiting the free exercise thereof. It is from these constitutional provisions that the entanglement doctrine sprang.

The entanglement doctrine developed by the United States Supreme Court as an aspect of religious freedom is explained in an article by James L. Underwood, *Permissible Entanglement under the Establishment Clause*, 25 Emory L. J. 17, 17-8. That article states:

> "First, the doctrine dictates that governmental programs must not have the purpose or effect of advancing or inhibiting religion. Second, it prohibits excessive intermixture of government and religion in the shape of intensive governmental control and surveillance of the activities of religious organizations. Third, it disallows comparable interference by religion with the workings of government. The doctrine has been described by Professor Freund as one demanding 'mutual abstention' by church and governmental officials from interference with each other's domain."

The Superintendent of Public Instruction would have us ratify what he conceives to be his duty — the continuing surveillance of this school to determine whether its

practices comport with those of the Catholic Church. He would have us say that he can properly make the determination of who or what is Catholic. This is an inquiry that government cannot make, and the prohibition against such an inquiry, as had been said by Leo Pfeffer, *Church, State, and Freedom* 302:

> ". . . is the price that must be paid for separation; yet careful consideration should lead to the conclusion that, aside from the requirements of the First Amendment, this result is far preferable to the conversion of secular courts into ecclesiastical tribunals in which, for example, Protestant, Jewish, or even atheistic judges might overrule a cardinal's, or, conceivably, even a Pope's interpretation of Catholic dogma."

The above quotation, of course, has principal reference to the unconstitutionality of secular tribunals overruling a determination of an ecclesiastical tribunal in matters of faith — the general theory being that secular judges do not have competence in the field, and, more importantly, that it is beyond the constitutional jurisdiction of a secular court to determine matters of faith or dogma. The quotation is, however, equally appropriate in a situation such as the one presently before the court, where the Superintendent of Public Instruction would attempt to have us determine on the basis of his findings that Community School practices in reference to religion are exclusively referable to "affiliation" with the Catholic denomination.

There is, of course, no excessive entanglement of the state with religion in the mere granting of transportation aids. This is a secular purpose which, in itself, is legally deemed to be unrelated to fostering or inhibiting religion.

But when the method of administering this aid requires a state imposed classification dependent upon religious allegiance of affiliation, and the administrator of the program concludes that surveillance of the institution receiving the aid is necessary to determine the nature of the school's religious program, the entanglement of the state in matters of religion becomes excessive.

This principle was recently well expressed in *New York v. Cathedral Academy*, ____ U.S. ____ (December 6, 1977). In that case, the New York state legislature authorized the reimbursement to sectarian schools for the expenses of performing state-required testing services. However, reimbursement was to be made only after a detailed inquiry which would show that the reimbursement was used only for secular purposes. The court said, in holding such procedures unconstitutional:

". . . that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, see n. 2, *supra*, the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.

"The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once. Cf. *Presbyterian Church v. Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440. When it is considered that ch. 996 contemplates claims by approximately 2,000 schools in amounts totalling over $11 million dollars, the constitutional violation is clear.

"For the reasons stated, we hold that ch. 996 is unconstitutional because it will of necessity either have the primary effect of aiding religion, see *Levitt v. Committee for Public Education, supra*, or will result in excessive state involvement in religious affairs. See *Lemon v. Kurtzman*, 403 U.S. 602." (Slip opinion at 7-8)

We would conclude that the detailed inquiry which the State Superintendent of Public Instruction has made is equally repugnant to the Constitution. By avoiding the making of that inquiry and by accepting the Holy Trinity Community School on the basis of its articles of incorporation as what it purports to be — a school independent of any denomination — the unconstitutionality in the administration of the statute can be avoided.

We believe that the language and rationale of a rather old case, *Bradfield v. Roberts*, 175 U.S. 291 (1899), is applicable here. The Supreme Court in that case was concerned with a congressional appropriation to hospitals in the District of Columbia. The court upheld the appropri-

ation against a challenge that it constituted a violation of the establishment clause.

Although the question in *Bradfield* was whether or not the hospitals were used for religious purposes — an issue not relevant to the instant case — the case is instructive in that the court did not attempt to pierce the corporate veil and instead looked only to the articles of incorporation. The court stated:

> "Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property. . . . Whether the individuals who compose the corporation under its charter happend to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. . . . That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient

> to convert such a corporation into a religious or sectarian body. . . . There is no allegation that its hospital work is confined to members of that church . . . ." (at 297-98)

While we reach no conclusion that the Court would follow the same approach at the present time, it is interesting to note that a similar rationale was followed in *Hunt v. McNair*, 413 U.S. 734 (1973).

For our purposes, it is sufficient to be apprised of the teaching of *Bradfield* that, at least in institutions concerned with the general welfare and where there is no claim, in respect to a school, that it is a public school, facial validity will be accorded to the expressed intentions of the incorporators in the corporate charter. We accord the same facial validity to the charter and bylaws of the Holy Trinity Community School. It purports to be a school fostering religion generally, but expressly disavows affiliation with any church denomination. We believe that, to inquire further, impinges on the religious right of citizens to make their own declaration in respect to their religious affiliation.

Under the constitution and laws of the State of Wisconsin, religious schools may receive transportation aids; and whether or not it could be concluded that Holy Trinity Community School is indeed affiliated with the Catholic denomination, the payment of transportation aids is not unconstitutional. However, to make the inquiry and to determine that the school is or is not affiliated with the Catholic denomination is to make an impermissible inquisition into religious matters. We are obliged to accept the professions of the school and to accord them validity without further inquiry.

Under the facts of this case, we hold that the Holy Trinity Community School is a private school, independent of any religious denomination; and, accordingly, as a matter of law it is entitled to a district-wide attendance area.

On oral argument, counsel for the Superintendent of Public Instruction argued that, if no inquiry were made beyond the facial representations of the corporate charter, other church-related schools might very well adopt the device used by the Community School — that is, to set up an independent corporation while in fact retaining their affiliation with a religious denomination. It was asserted that this might be done to make possible a larger attendance area and that this would insure the perpetuation of a parochial school that might otherwise be unable to survive.

It should be noted that, even though the usual rule is to give finality to the rulings of ecclesiastical adjudicatory bodies, the courts reserve the right to look behind such decisions where there is evidence of fraud or collusion. *E.g., Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

Although the Attorney General's fears are by no means preposterous, fraud is not alleged in the present case. Counsel for the Superintendent specifically disclaimed that there was any fraud in respect to the claim of the Community School. Fraud must be proved by clear and convincing evidence; and were fraud alleged and proved, we would look behind a representation which on its face purported to demonstrate a complete lack of denominational affiliation.

The very fact that the Attorney General argues that the statutory prohibition against the overlapping of attend-

ance districts of schools affiliated with the same denomination may encourage religious disaffiliation raises yet another specter of unconstitutionality, albeit a specter that does not materialize under the facts of the instant case. If it can be said that sec. 121.51(4), Stats., encourages parochial schools to disaffiliate from their former parent denomination in order to secure additional state transportation aids, does not the operation of that statute inhibit the free exercise of religion?

Justice John Stevens of the United States Supreme Court alluded to that possibility in his brief dissent to *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 775 (1976), when he wrote:

> ". . . I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith."

A similar concern was expressed in the Emory Law Journal, *supra*, at 35-6, when the author of the article stated he thought it appropriate to focus upon the psychology of the officials of religious schools who seek to participate in the largesse afforded by governmental aids to education. He wrote:

> "The mere existence of inspection powers designed to root out any religious usage . . . could divert the long-range planning of an institution from its religious goals. Consequently, an assistance program might have

the primary effects of inhibiting religion and violating Establishment Clause standards. Such a diversion of religiously affiliated institutions away from religious goals was historically a concern of proponents of religious freedom. For example, the Hanover Presbytery, in its notable series of correspondence the Virginia Assembly, asserted that state 'support would render preachers accountable to the state, not to Christ.'

"Seeking to qualify for state aid could produce a significant alteration in institutional goals. Justice Brennan, dissenting in *Hunt*, asserted that

> "'[t]he College's freedom to engage in religious activities and to offer religious instruction is necessarily circumscribed by this pervasive state involvement forced upon the College if it is not to lose its benefits under the Act.'"

That issue, the effect of the statute possibly being to discourage religion, is only adumbrated under the facts of this case. As pointed out, however, earlier in the opinion, the trial judge in his decision stated that the Community School disaffiliated from its former relationship with the Catholic Church in order to overcome the limitations placed upon it by the statute, which prohibits overlapping attendance districts by schools of the same denomination. There looms on the horizon, therefore, another constitutional question in regard to the student transportation act. Rather than being of assistance only to the children who attend a religious school, does it not in fact encourage religious schools, in order to survive, to disavow their

religious beliefs and associations? The question is neither posed nor argued by the parties, and we do not comment on it further.

As stated in the recital of the facts, this case comes to the court in an unusual posture. The avowed disaffiliation of a parochial school from its parent hierarchical body is unique in Wisconsin legal history. In the usual case, religious affiliation is acknowledged and uncontested.

In respect to the case before us, we hold only, where a religious school demonstrates by a corporate charter and bylaws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there. To make the further inquiry, as attempted by the Superintendent of Public Instruction, is to involve the state in religious affairs and to make it the adjudicator of faith. To so proceed results in the excessive entanglement of the secular state with religious institutions and is forbidden by the Constitution of the United States.

By the Court. — Judgment reversed and cause remanded, with directions to enter judgment ordering the Superintendent of Public Instruction to designate an attendance area co-extensive with the school district.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1590

WILLIAM C. KAHL,
State Superintendent of Public Instruction,
Petitioner,

v.

HOLY TRINITY COMMUNITY SCHOOL., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

Respondent disagrees with Petitioner's contention

> "that the validity of a state statute is drawn into question as violating the prohibition against the establishment of religion as provided by the first amendment to the United States Constitution."

The Wisconsin Supreme Court found an administrative misinterpretation of a Wisconsin statute which misinterpretation was found to violate the prohibition against the establishment of religion as provided by the First Amendment to the United States Constitution.

QUESTION PRESENTED

1. Where a State official is responsible for administering a state statute providing transportation for children to private schools, whether religious or non-religious, which statute provides that the attendance areas from which transportation will be provided to private schools affiliated with the same religious denomination shall not overlap, may such state official, in the absence of fraud, inquire beyond the Articles of Incorporation and By-Laws of a religious private school which prohibit "affiliation" with any religious denomination, to make his own determination that such school is or is not "affiliated" with a particular religious denomination?

STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioner's statement.

STATEMENT OF THE CASE

The Respondent agrees with the Petitioner's Statement of the Case, except the sentence:

> "The respondent school attempted to disaffiliate with the Roman Catholic Church by filing Articles of Incorporation to that effect with the Wisconsin Secretary of State."

The respondent school was incorporated as a Wisconsin non-stock, non-profit corporation. The By-Laws provide that the school maintained by the corporation shall be operated in a Christian-Judeo tradition, that students are to be encouraged "to practice the religion of their choice", that there shall not be any "affiliation" with

any religious denomination. The Respondent has never operated a school affiliated with any religious denomination.

HOW FEDERAL QUESTION IS PRESENTED

Respondent agrees with Petitioner's statement.

REASONS FOR NOT GRANTING WRIT

A. The Actual Question Presented Is Very Narrow.

The question actually presented by the Wisconsin Supreme Court opinion is a very narrow one. It is limited to a particular Wisconsin administrative misinterpretation of a Wisconsin statute, and to a particular set of facts arising under that statute. The questions posed by the Petitioner are not present in the case. They are anticipatory of issues which the Petitioner thinks may arise in other situations under other statutes. Further, although the court chose to base its opinion on the First Amendment, it could base the same opinion on Article I, Section 18 of the Wisconsin Constitution which substantially parallels the First Amendment in interpretation, except that it goes further than the First Amendment in prohibiting state interference in religious affairs. *State ex rel. Warren v. Nusbaum,* 55 Wis. 2d 316, 198 N.W.2d 650 (1972); *State ex rel. Reynolds v. Nusbaum,* 17 Wis. 2d 148, 115 N.W.2d 650 (1962).

B. The Opinion Below Correctly Interprets The Establishment Clause.

The Wisconsin Supreme Court opinion did not hold, as Petitioner seems to infer, that the State may not in-

quire whether an organization is or is not religious. The Court held, that under the Wisconsin school transportation statutes

> ". . . the authority of the legislature to provide for the transportation of children to and from any parochial or private school is unchallenged. The nature of the school, whether it be public or private, sectarian or not, therefore is irrelevant to its statutory right to receive transportation aids." (*See* Petitioner's Appendix, p. 104)

The real contention of the Petitioner, as put by the Court is

> "The Superintendent of Public Instruction would have us ratify what he conceives to be his duty — the continuing surveillance of this school to determine whether its practices comport with those of the Catholic Church. He would have us say that he can properly make the determination of who or what is Catholic." (*See* Petitioner's Appendix, pp. 112-113)

and

> ". . . the Superintendent of Public Instruction would attempt to have us determine on the basis of his findings that Community School practices in reference to religion are *exclusively* referable to 'affiliation' with the Catholic denomination." (*See* Petitioner's Appendix, I a at 113, ***Emphasis added***)

There is no federal constitutional prohibition against providing school transportation to parochial schools. *Everson v. Board of Education,* 330 U.S. 1 (1947). Thus, the decision that Respondent is entitled to an attendance area for school transportation purposes does not create any constitutional issues. The constitutional problem created in this case was created by the Petitioner's administrative opinion that Section 121.51(3) permitted the Petitioner to make determinations of religious affiliation in order to decide whether Respondent should have a large or small attendance area.

The potential effect on administration of programs of tax exemption and educational assistance argued by Petitioner is non-existent. The holding of the case is very limited:

> "In respect to the case before us, we hold only, where a religious school demonstrates by a corporate charter and by-laws that it is independent of, and unaffiliated with, a religious denomination, that in the absence of fraud or collusion the inquiry stops there." (*See* Petitioner's Appendix, p. 121.)

C. The Opinion Below Does Not Put The Petitioner In The Position Of Violating The Establishment Clause.

Petitioner argues that under *Walz v. Tax Commission,* 397 U.S. 664 (1970) the finding of fact that an institution is or is not affiliated with a particular religious denomination does not establish or interfere with religion. It is a long step from *Walz* to where Petitioner wants to go.

A determination that a particular piece of exempt property was in fact being used for religious worship as in *Walz* is not the same as a determination that a religious practice relates exclusively to or shows affiliation with one particular denomination. The other cases cited by Petitioner do not relate to civil law determinations of affiliation or non-affiliation with particular ecclesiastical groups, but with civil law determinations of which ecclesiastical bodies have the authority to make the ecclesiastical determination of affiliation or to determine conflicting claims over reality or personalty between opposing or split religious groups.

In the case at hand, an administrator of the State of Wisconsin has made a determination of church membership. Respondent submits that a better rule was established long ago when this Court stated "we cannot decide who ought to be members of the church. . .". *Bouldin v. Alexander,* 15 Wall. 131 at 139, 140 (1872).

D. There Is No Jurisdiction Under 28 U.S.C. § 1257(3).

The jurisdictional claim of the petitioner is that the constitutionality of a state statute is at issue. That is not correct. The only matter at issue is an administrative interpretation of a state statute. The Wisconsin Supreme Court struck down that interpretation. The validity of the statute was never questioned by either party.

E. Conclusion

Based on the foregoing, Respondent respectfully submits that the decision of the Wisconsin Supreme Court is not in conflict with established law and the Writ of Certiorari should be denied.

Respectfully submitted,

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